



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Department of Energy--Request for
Reconsideration; Westinghouse Hanford
Company--Request for Reconsideration; United
Telephone Company of the Northwest

File: B-246977.2; B-246977.3; B-246977.4

Date: July 14, 1992

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DIGEST

1. The General Accounting Office affirms prior decision, which sustained a protest that a management and operations contractor of the Department of Energy violated the terms of its own procurement provisions and the "federal norm" in making award under a solicitation for a telecommunications system, rather than amending the quantity estimates contained in the solicitation to reflect significant changes in the government's estimated needs.

2. The General Accounting Office (GAO) denies request for modification of recommendation, contained in a prior decision sustaining a protest, that a management and operations contractor of the Department of Energy reopen the competition on the basis of a solicitation that reflects its current requirements, where GAO was cognizant of the potential termination liability in making the recommendation and where the evidence provided in support of the request was available during the initial consideration of the protest and, in any event, still demonstrates significant differences between the government's current requirements and those stated in the solicitation.

DECISION

The Department of Energy (DOE) and Westinghouse Hanford Company, a management and operations (M&O) contractor that conducted the subject procurement "by or for" DOE, request reconsideration of our decision and recommendation in United Tel. Co. of the NW., B-246977, Apr. 20, 1992, 92-1 CPD ¶ 374. In that decision, we sustained United's protest--that Westinghouse improperly awarded a contract to US West Communications Services, Inc. for a telecommunications system for the DOE Hanford Nuclear Site--on the basis that request for proposals (RFP) No. K393260 had ceased to reflect Hanford's telecommunications needs during the 2-1/2 year protest-caused delay between the selection decision and the award. We recommended that Westinghouse reopen the competition on the basis of its changed requirements.

We affirm our prior decision, sustaining United's protest, and deny the request for modification of our recommendation.

The RFP called for the contractor to design, engineer, install, operate, and maintain a telecommunications system with a 10-year minimum useful life for the Hanford Nuclear Site on a fixed-price basis. The telecommunications system was to interface with the site's existing data communications technology, including Hanford's Local Area Network, and provide its own voice and data transmission capabilities integrated into one digital network. The specifications stated that the integrated system must support the RFP's estimated telecommunication requirements up to a 30,000 port capacity, both at the time of cutover and over the 10-year useful life of the system. Among these requirements, the RFP estimated the number of voice-only stations, data-only stations, integrated voice/data stations, and off-premise stations that offerors must "equip" (i.e., install for service, with the necessary line and trunk interface cards) and "wire" (i.e., install wiring and card cages, but no interface cards) before cutover. The RFP also estimated the number of "equipped" and "wired" lines and trunks needed to convey this voice and data traffic from a host switch to the appropriate termination. The RFP's variable quantities clause permitted Westinghouse to increase any of the quantities called for under the purchase order up to a total of 50 percent of the established baseline quantities.

The RFP provided for award to the firm offering the most advantageous technical and cost proposal, based upon four evaluation factors: (1) mission suitability; (2) cost; (3) company experience and past performance; and (4) other factors. Under the evaluation scheme, factor one was 6 times as important as factors three and four combined, and factor three was 3 times as important as factor four.

On December 29, 1988, Westinghouse concluded negotiations with each offeror and requested best and final offers (BAFO), to which four firms responded. After extensive evaluations, only United and US WEST remained within the competitive range. Although United received a slightly higher technical rating than US WEST, Westinghouse did not consider either offeror technically superior and recommended that DOE approve US WEST for award, primarily owing to the firm's lower evaluated cost.

On April 27, 1989, United protested the proposed award to the General Services Administration Board of Contract Appeals (GSBCA), which sustained the protest on grounds that a conflict of interest and post-BAFO discussions tainted the procurement. United Tel. Co. of the NW., No. 10031-P, July 25, 1989, 89-3 BCA ¶ 22,108, 1989 BPD ¶ 251. US WEST and Westinghouse appealed to the Court of Appeals for the Federal Circuit, which vacated the GSBCA's decision on jurisdictional, rather than substantive, grounds on July 29, 1991. US WEST Comms. Servs., Inc. v. United States, 940 F.2d 622 (Fed. Cir. 1991). Westinghouse obtained DOE's approval to award the contract to US WEST on October 8, 1991. United protested the award to our Office on October 18, 1991, alleging that DOE unreasonably approved the award in view of the GSBCA decision sustaining United's protest and DOE's defense of that decision before the Court of Appeals. We dismissed this protest as untimely in United Tel. Co. of the NW., B-246333, Dec. 18, 1991, 91-2 CPD ¶ 563, aff'd, B-246333.2, Feb. 19, 1992, 92-1 CPD ¶ 206.

The agency report submitted on the dismissed protest included an August 1991 pre-award requirements forecast developed by Westinghouse. Based upon that forecast, United protested that the RFP could not legally support the contract award under Westinghouse Procurement Manual (WPM) § 5.2 because the RFP requirements no longer reflected Hanford's telecommunications needs. The cited Westinghouse provision mirrors Federal Acquisition Regulation (FAR) § 15.606, which generally requires the government to issue an amendment to a solicitation whenever its requirements change.¹ Because United did not file this protest within

¹Federal procurement law was not directly applicable to this protest. Rather, Westinghouse, as an M&O contractor purchasing "by or for" the government, was required to conduct the procurement according to the "federal norm," which, in this case, was reflected in the terms of Westinghouse's own prime contract and agency-approved procedures. Chesapeake Laser Sys., Inc., B-242350, Apr. 8, 1991, 91-1 CPD ¶ 358. The governing Westinghouse regulation, WPM § 5.2, was virtually identical to FAR § 15.606. Therefore, our decision was assisted by case law interpreting and

10 calendar days of contract award, Westinghouse did not stay performance of the US WEST subcontract.

The Westinghouse review documents demonstrated, among other things, a substantial increase in Hanford's need for integrated voice/data stations (almost 3 times more than the RFP's baseline quantities) and a moderate increase in its need for voice-only stations (23 percent more than the baseline quantities). Concomitantly, the number of data-only stations to be equipped and wired both at the time of cutover and during each of the 10 years of the system's useful life declined by approximately 90 percent.

The opposing parties, DOE, Westinghouse, and US WEST, did not dispute these apparent changes. Instead, they argued, among other things, that the RFP's variable quantities clause encompassed these changes, so that the revised estimates could not be considered a departure from the RFP requirements.

In rejecting this argument, we observed that, where the government's requirements change after RFP issuance, it must issue an amendment to notify offerors of the changed requirements and afford them the opportunity to respond. See FAR § 15.606(a). We stated that one circumstance requiring the issuance of an amendment is a significant change in the government's quantity requirements. See Universal Techs., Inc., B-241157, Jan. 18, 1991, 91-1 CPD ¶ 63; Management Sys. Designers, Inc. et al., B-244383.4 et al., Dec. 6, 1991, 91-2 CPD ¶ 518. While we recognized that a contract that permits the ordering of indefinite quantities does give the government flexibility when it cannot determine its needs in advance of contracting, the use of such a contract does not excuse the government from actually identifying its needs in the solicitation. Management Sys. Designers, Inc. et al., supra; N.V. Philips Gloellampenfabriken, B-207485.3, May 3, 1983, 83-1 CPD ¶ 467.

The WPM provision that governed this protest was consistent with the above principles, providing that "[w]hen, either before or after receipt of proposals [Westinghouse] changes, relaxes, or otherwise modifies its requirements, a written amendment to the RFP shall be normally issued." WPM § 5.2. In this case, we found that WPM § 5.2 required the submittal of revised price and technical proposals because the changes in the estimated quantities of voice and data lines covered by the RFP could significantly impact both the offerors' pricing strategies and technical approaches.

applying the FAR provision.

In its reconsideration request, DOE primarily reiterates the claim that quantity changes within the scope of an indefinite quantity contract cannot be considered "changes" subject to WPM § 5.2. DOE's arguments in this regard largely duplicate those raised and considered during our initial review of the protest and do not provide a basis for reconsideration. See R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274.

DOE seeks to distinguish N.V. Philips Gloellampenfabriken, supra, one of the cases cited in our prior decision, which held that revised proposals should be sought where the agency significantly changes its estimated quantities, even if these changed estimates do not exceed the scope of the indefinite quantity contract. DOE argues that Philips is inapplicable because the issue there was whether the agency could cancel a solicitation owing to such quantity changes, not whether it must cancel the solicitation. Although this factual distinction is present, Philips expressly found that the predecessor regulation to FAR § 15.606 (and thus WPM § 5.2) applies whenever an agency awards or proposes to award a contract with the knowledge that its estimated quantities significantly vary from those stated in the solicitation as competed, regardless of whether the variation was authorized under the contract or was generated during a protest-caused delay. As discussed in our prior decision, FAR § 15.606 and WPM § 5.2 require the agency to solicit revised proposals whenever it changes, relaxes, increases or otherwise modifies its requirements, "regardless of the stage of the acquisition."

Here, Westinghouse chose to proceed to award in the face of an analysis that showed significant variations in the estimated quantities from those on which offerors prepared their proposals. As observed in our prior decision, some of Westinghouse's revised estimates exceeded the RFP's baseline quantities by more than the authorized 50 percent variation and do not appear to be within the scope of the RFP's variable quantities clause. While DOE and Westinghouse argue that they had the discretion to proceed to award, notwithstanding an analysis that reflected changed requirements, an agency may not properly award a contract where its requirements significantly change since this would prejudice other offerors. InterComp Co., B-213059, May 22, 1984, 84-1 CPD ¶ 540.

In its comments in support of DOE's reconsideration request, Westinghouse challenges our reliance on cases concerning change within the indefinite quantity context, because, according to Westinghouse, the solicited telecommunications system is not an indefinite quantity requirement. Westinghouse acknowledges that the RFP provides for the indefinite quantity acquisition of voice and data lines and that these

lines are "obviously a necessary component of the total system," but characterizes the RFP as a "comprehensive procurement of a turnkey telephone system . . . drafted and competed to allow broad flexibility in system design and technical approach."

We disagree with Westinghouse's current characterization of the contract. The major system components--the stations for voice-only, data-only, and voice/data transmissions, as well as the attendant lines and trunks--are all solicited on the basis of estimated quantities. Also, the RFP incorporates a variable quantities clause that permits Westinghouse to increase the quantity of any solicited item up to a total of 50 percent of the established baseline, including "[a]dditional station equipment, main station lines, trunks, and services required for system expansion." Thus, we are not persuaded by Westinghouse's current efforts to distinguish this RFP from the indefinite quantity variety. We note that during our initial consideration of the protest, DOE also described the RFP as requiring a combination of services and components "to be provided in the context of an indefinite quantity, term type contract." Westinghouse itself described the RFP's variable quantities clause as "dispositive of the central issue of [United's] protest."

DOE and Westinghouse also argue that our decision represents a troubling departure from well-settled precedent that affords procuring agencies broad discretion in determining their actual minimum needs and the appropriate means to satisfy those needs. The requesters claim that we substituted our own independent technical judgment for that of the agency and failed to base our decision strictly on the record before us.

Contrary to DOE's and Westinghouse assertions, our Office relied exclusively on Westinghouse's own analysis of whether the contract award was appropriate in light of its findings that Hanford's telecommunications needs had significantly changed during the 2-1/2 years of bid protest litigation. We did not perform an independent technical investigation, but accepted as true Westinghouse's assessment of its minimum needs, as reflected in the August 1991 revised telecommunications forecast. None of the opposing parties, DOE, Westinghouse, or US WEST, disputed the changes identified by Westinghouse in these 1991 review documents. Our Office merely evaluated the reasonableness of Westinghouse's decision to proceed with contract award under the RFP, as issued, notwithstanding the undisputed changes in Hanford's telecommunications needs. This does not constitute a substitution of our judgment for that of the agency, but a review of the agency's determination to accommodate its

changed requirements through an unamended RFP. See generally MSI, a Div. of the Bionetics Corp., B-243974 et al., Sept. 17, 1991, 91-2 CPD ¶ 254; Cylink Corp., B-242304, Apr. 18, 1991, 91-1 CPD ¶ 384.

DOE and Westinghouse have raised other substantive objections to our decision, for example, that the decision contains technical errors. The requesters failed to raise these and other bases for reconsideration within the 10-day time frame required by our Bid Protest Regulations and, therefore, we decline to entertain these arguments further. See 4 C.F.R. § 21.12(b) (1992); MRL, Inc.--Recon., B-235673.4, Aug. 29, 1989, 89-2 CPD ¶ 188.

DOE and Westinghouse request that we modify our recommendation that Westinghouse reopen the competition on the basis of its changed requirements. The requesters claim that our recommendation failed to appreciate the costs attendant upon the possible termination of the US WEST subcontract, which they project would be at least \$4 million. They argue that our recommendation, which observed that US WEST had only performed 5 months of the 10-year contract, ignored the fact that substantial costs will be incurred during the first 16 months of the contract, the installation period before "cutover."

We note first that the documentation in support of the estimated termination costs is speculative and inconclusive. Westinghouse has cautioned us that we should not treat its estimate as "an admission as to actual costs of termination." We were aware during our consideration of the protest that the initial installation period would command the heaviest contract expenses and that termination liability could be considerable. We still felt that recompetition would be in the government's best interest because the unamended specifications appearing in the contract had substantially ceased to reflect Hanford's changed telecommunications needs. Our expectation of appreciable termination liability (not incompatible with the cost estimate now offered) did not undermine our belief in the appropriateness of the remedy, given the extent of change evidenced by the record before us. Also, we note that DOE and Westinghouse have elected to proceed diligently with the US WEST contract, notwithstanding our decision sustaining United's protest, which will exacerbate potential damages to the government. See Honeywell Fed. Sys. Inc. et al., 69 Comp. Gen. 445 (1990), 90-1 CPD ¶ 469.

Westinghouse claims that Hanford's telecommunications requirements have again changed since the August 1991 forecast to approximate more closely the RFP quantities, such that the basis for our recommended remedy is now obsolete. Westinghouse has produced as evidence two requirements

forecasts, dated February 13, 1992 and June 4, 1992. Both forecasts show that the number of data lines has virtually returned to the quantities specified by the RFP.²

It is not clear why Westinghouse failed to introduce the February 13 requirements forecast during the pendency of the initial protest, although it was presumably available at that time and clearly relevant to a central issue in United's protest. The February and June forecasts do not support Westinghouse's contention that the telecommunications requirements have returned to the quantities specified in the RFP. Although the data requirements do approach the RFP quantities, the voice requirements remain well above those specified in the RFP under both the February and the June forecasts. Both forecasts reflect an approximate 50 percent increase in the requirement for voice lines above the RFP quantities. The requirement for integrated voice/data lines reflects a more dramatic, 5-fold increase from the RFP baseline in February and a 2-fold increase from the baseline in June. Thus, Westinghouse's current estimates still remain significantly different from the requirements stated in the RFP. US West submitted a proposal claim of \$30 million, later amended to \$11.4 million, in response to the changes contained in the February requirements forecast.³

Westinghouse asserts that our recommendation is ambiguous as to the scope of the reopened competition, but argues that any form of recompetition will result in an unacceptable delay in the acquisition of the telecommunications system.⁴ We crafted our recommendation to leave to the agency's discretion the appropriate form of recompetition, depending upon the extent of revision needed to adjust the RFP to

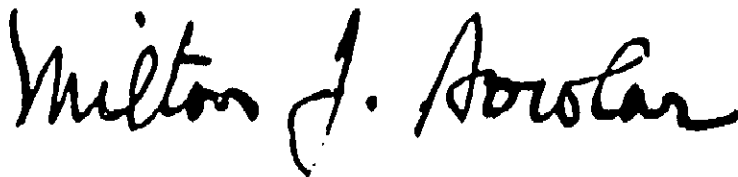
²The requirement for data lines in the February forecast is virtually identical to that specified in the RFP and is decreased by 11 percent in the June forecast.

³The claim, as amended, is a significant percentage of the contract value.

⁴WPM § 5.2 provides for several possible forms of recompetition to redress a change in solicitation requirements. Depending upon the stage in the acquisition cycle in which the change occurs and the magnitude of the change, Westinghouse could be required to communicate an amended RFP to all responding offerors or to only those offerors within the competitive range, in this case, United and US WEST. If the change is so substantial that it warrants complete revision of the RFP, Westinghouse should cancel the solicitation and issue a new one, regardless of the stage of the acquisition. See also FAR § 15.606(b), (c).

Hanford's actual requirements. The drastic fluctuations in Hanford's telecommunications requirements over the past 10 months, as reflected in the three requirements forecasts provided by Westinghouse, indicate a need for a more precise requirements analysis before the agency determines the appropriate form of recompetition. Given the volatile nature of Westinghouse's on-going estimates and US West's significant claim, we remain convinced that any delay in the acquisition of this system will be well spent in reconsidering and restating Hanford's actual telecommunications needs.

Our prior decision, sustaining United's protest, is affirmed, and the request for modification of our recommendation is denied.⁵

for 
Comptroller General
of the United States

⁵Based upon information allegedly discovered in connection with this request for reconsideration, United protested that Westinghouse changed, relaxed, or modified other RFP requirements, so as to necessitate the recompetition of the telecommunications system. We presume that the agency will consider these alleged changes in defining its requirements in the aftermath of today's decision affirming our prior decision and denying the request for modification of our recommendation. Thus, further consideration of this protest would serve no useful purpose and, accordingly, we dismiss it as academic. See Electronic Sys. USA, Inc., B-241254, Jan. 16, 1991, 91-1 CPD ¶ 43.